

**BEFORE THE DISCIPLINARY REVIEW COMMITTEE  
STATE OF CALIFORNIA**

In the Matter of the Decision of  
the Agricultural Commissioner of  
the County of Santa Clara  
(County File No. 2 43 07 09)

Docket. No. S-017

**DECISION**

**Cesar Arevalo**  
**c/o Mission City Fumigation**  
**211 Ryland Street**  
**San Jose, California 95110**

**Appellant/**

**Procedural Background**

The Business and Professions Code (BPC) section 8617 authorizes the county agricultural commissioner to levy a civil penalty of up to \$5,000 for each violation of certain State structural pest control and pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Santa Clara County Agricultural Commissioner (CAC) found that Appellant violated Title 3 of the California Code of Regulations (3 CCR) section 6614(b)(2). 3 CCR section 6614(b)(2) provides that no pesticide application shall be made or continued when there is a reasonable possibility of damage to nontarget crops, animals, or other public or private property. The CAC imposed a penalty of \$700 for the violation.

Mr. Cesar Arevalo appealed from the commissioner's civil penalty decision to the Disciplinary Review Committee (Committee). The Committee has jurisdiction of the appeal under BPC section 8662. Members serving on the Committee were Mr. Peter Giammarinaro for the structural pest control industry, Ms. Kelli Okuma for the Structural Pest Control Board, and Mr. Gary Knutilla for the Department of Pesticide Regulation. The Committee reviewed the evidence between August 21, 2008, and September 15, 2008.

**Standard of Review**

The Committee decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Committee looks to see if there was substantial evidence in the record, contradicted or uncontradicted, before the Hearing Officer to support the commissioner's decision. The Committee notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion even though other conclusions might also have been reached. In making the substantial evidence determination, the Committee draws all reasonable inferences from the information in the record to support the findings and reviews the record in the light most favorable to the commissioner's decision. If the Committee finds substantial evidence in the record to support the commissioner's decision, the Committee affirms the commissioner's decision.

If a commissioner's decision presents a matter of an interpretation of a law or regulation, the Committee decides that matter using its independent judgment.

### **Factual Background**

On July 11, 2007, Mr. Arevalo and his crew, employed by Mission Fumigation, made an application of nineteen pounds of Vikane, registration number 62719-4, to the residence at 470 Skyway Drive, San Jose, Santa Clara County. Vikane is a restricted use pesticide bearing the signal word, "Danger." Vikane is a restricted use pesticide due to the inhalation toxicity.

The application site included a partially enclosed patio. In the patio area there was an area that day-lighted to the exterior. Santa Clara county staff conducted an aeration inspection on the day following the fumigation. When the tarp was removed, the inspectors found a dead cat inside the patio enclosure. In close proximity to the dead cat there was an unopened can of wet cat food. In the backyard of the house, there was an open bag of dry cat food. In back of the house, about twenty feet from the house, there was a feeding bowl with dried cat food around it and some feeding utensils with dried cat food on them. There was also another feeding bowl with dried cat food in the wall void in or near the patio area.<sup>1</sup>

There is evidence in the record that the resident of the treatment site told Mr. Arevalo that she did not have any pets. Later, after the dead cat was found, the resident told Mr. Greg Munoz, a supervisor with Mission Fumigation, that she occasionally fed feral/stray cats to help keep the mice and rats under control.

Mr. Arevalo testified that he did not see the unopened can of wet cat food, the feeding bowls behind the house or in the wall void, or the serving utensils. Mr. Arevalo testified that his crew had told him about the opened bag of dry cat food prior to the treatment.

At the hearing held on April 9, 2008, the county found that Mr. Arevalo had violated 3 CCR section 6614(b)(2) and fined him \$700. Mr. Arevalo appeals that decision.

### **Appellant's Contentions**

Mr. Arevalo contends that the mere presence of cat food does not constitute a reasonable possibility that a cat would be on the premises; that he and his crew conducted a thorough search of the house and adjacent area to be fumigated and found no cat; that the owner told him that there were no pets on the property; that the owner failed to inform him that she occasionally fed a feral cat. Finally, Mr. Arevalo contends that because his primary language is Spanish, he did not fully comprehend the questions asked of him during his hearing.

### **Did the Appellant Violate 3 CCR 6614(b)(2)**

3 CCR section 6614(b)(2) provides in relevant part, ". . . [N]o pesticide application shall be made or continued when: . . . (2) There is a reasonable possibility of damage to nontarget crops, animals, or other public or private property; . . ."

Mr. Arevalo possessed a Branch One Field Representative's license issued by the Structural Pest Control Board at the time of the application. The pesticide applied by

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<sup>1</sup> No pictures of the dry cat food, the bowls, or the serving utensils were taken or introduced into evidence by the county. The appellant did not object, provide contradictory evidence, or testify to the contrary.

Mr. Arevalo and his crew was Vikane, an ultra-hazardous material. Vikane is used with the intent to kill everything in the treated area. Due to the extreme likelihood of harm, the law requires the applicator to evaluate the possibility of damage to nontarget animals to eliminate any reasonable possibility that an animal would be killed by the application. The presence of the unopened cat food in the patio area, the two feeding dishes and serving utensils “encrusted” with dried cat food, in plain site, demonstrates the presence of a cat.

There is evidence in the record that Mr. Arevalo did not document the cat paraphernalia in his fumigation log. It was the testimony of the county’s witness, Mr. Mario Nunez, Santa Clara County Agricultural Biologist, that had Mr. Arevalo documented the presence of the cat food, the cat dishes, and the cat food serving utensils, and steps taken to assure that the animal was not present, the county would not have taken the initial action that is appealed here. The county alleged that there was no documented “due diligence” by the Appellant in his log. Title 16 of the California Code of Regulations section 1970 lists the required information to be listed on a fumigation company’s log. The title of the section is, “Standards and Record Requirements.” One of the items required by this section is, “Special notes or comments pertinent to fumigation.” The county’s testimony inferred that Mr. Arevalo’s failure to note the presence of the cat food items shows his lack of due diligence.

There is evidence in the record that Mr. Arevalo’s crew moved an opened bag of dry cat food and placed it into the back yard and informed him of the presence of the cat food. After placing the tarp on the home, Mr. Arevalo walked through the area and, although it was dark, he could still see. The inference is that the Appellant could see under the tarp, but his vision was limited. Mr. Arevalo testified that after the tarp was placed and sealed, that he did not see any seams, holes or broken seals that the feral cat could have use to enter the treated area after the application began. The inference is that the cat was in the treatment area prior to the introduction of the Vikane. The Appellant introduced chloropicrin for twenty minutes prior to use of Vikane and did not observe anything out of the ordinary.

Mr. Arevalo testified that he did not see the cat food, cat food bowls, or the serving utensils. Mr. Munoz, Mr. Arevalo’s supervisor, testified that “it is really hard for the applicator to look for a pet when the homeowner told them there was no pet.” The bag of opened dry cat food, the two feeding bowls, the unopened wet cat food, and the soiled serving utensils provided evidence that there may have been a cat in the area, but not necessarily the treatment area.

The CAC’s advocate asked Mr. Greg Munoz, Mr. Arevalo’s supervisor, the hypothetical question: if the owner had informed the applicator that they had a dog, but prior to the application, cat food was found, would that be sufficient motivation to make a follow-up contact with the homeowner to clarify the situation? The answer was that the applicator would contact the resident to clarify the situation.

In this instance, Mr. Arevalo testified that his crew told him that bag of dry cat food had been removed from the treatment area. Mr. Arevalo also testified that he did not inspect the area to see if there were other indications that a cat was present or he would have seen the bowls, the canned food and utensils, and that he did not contact the owner to clarify if a cat might be present. He proceeded with the application.

Mr. Arevalo contends in his appeal that he did not fully understand the questions put to him during the hearing. Upon review of the audio record made of the hearing, it appears that Mr. Arevalo answered all of the questions as if he understood the question.

The Committee is in disagreement as to the sufficiency of the evidence in support of the violation. One member found that there was substantial evidence to support the finding that Mr. Arevalo proceeded with the fumigation when there was a reasonable possibility of damage to a non-target animal. Two members of the committee found that, in light of the fact that the owner had told the applicator that she had no pets, the presence of the wet and dry cat food, the bowls and the dirty utensils was not sufficient to support the conclusion that there was a reasonable possibility that a cat was present requiring that fumigation not to go forward.

**Conclusion**

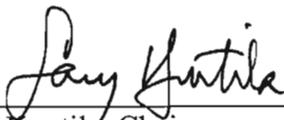
The commissioner's decision is not supported by substantial evidence and therefore reversed.

**Disposition**

The Santa Clara County Agricultural Commissioner's decision is reversed. The \$700 civil penalty levied by the commissioner against the appellant is excused

**STATE OF CALIFORNIA  
DISCIPLINARY REVIEW COMMITTEE**

Dated:           OCT - 6 2008          

By:                       
Gary Knutilla, Chairperson  
of the Disciplinary Review Committee

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